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No. 90-1646

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS B. CONNELL,
PETITIONER,

v.

BANK OF BOSTON AND JOHN S. INGALLS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employee in an age discrimination case presented competent evidence sufficient to create a material issue of fact concerning whether his employer's proffered business justification for his termination was pretextual.

Whether an alternative rationale adopted by only one of three Circuit Judges, each of whom wrote separate opinions, constitutes a holding of the case appropriate for review by this Court under a writ of *certiorari*.

Whether evidence which contests only one subsidiary component of an employer's business justification but which fails to contest the genuineness of the employer's asserted business motivation for terminating an employee precludes the entry of summary judgment for the employer.

Whether, assuming that an employee offers competent evidence to rebut one or more of the employer's business justifications for its conduct, it is error for the trial court to assess all of the evidence in the case to determine whether a jury could reasonably find for the plaintiff, rather than automatically to rule that summary judgment must be denied on the strength of the plaintiff's original *prima facie* case.

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STATEMENT OF THE CASE[1]

Petitioner's statement of the case omits two critical matters. It does not disclose the fact that there was an undisputed, non-discriminatory reason articulated by Bank of Boston (the "Bank") for terminating the employment of Thomas D. Connell ("Connell"). Nor does it set out the very limited holding in the decision of the Court of Appeals for the First Circuit as to which *certiorari* is sought.

[1] Respondent concurs with the Rule 29.1 Statement contained in the petition.

The Bank presented evidence that Connell was terminated pursuant to a reorganization which involved the elimination of some jobs, and because Connell's supervisor, John S. Ingalls ("Ingalls"), the division manager, believed him to be the worst performer among the five account officers in his unit (App. A-7, B-2). In reaching that conclusion, Ingalls took into account (1) Connell's performance ratings, (2) the fact that the unit manager, Connell's direct supervisor, did not have a favorable view of Connell's work, and (3) his belief that Connell had mishandled two specific accounts (App. A-7-8). Connell, in his opposition to the Bank's motion for summary judgment, disputed only the third subordinate reason (App. A-9, B-6-7).

At the time of his termination, Connell was one of six hundred assistant vice presidents at the Bank (App. B-2). He also was one of five municipal finance officers in the Municipal Finance Unit (App. B-2). During his tenure with the Bank from 1963 to 1986, Connell had on several occasions received negative performance reviews or reviews with negative comments to which he had taken exception.[2]

Less than two months before Connell's discharge, the manager of the Municipal Finance Unit recommended to Ingalls that the unit be abolished because of lack of profitability and

[2] The District Court's opinion reprinted at B-1 in the Appendix to the petition for *certiorari* contains a printing error at page B-2. The opinion, in fact, states: "While Connell disputes his performance ratings, his personnel records from 1963 to 1986 [not "1968" as reprinted at B-2] show consistently below average ratings by his superiors." Connell's assertion in his petition at 3 that he had received "good evaluations" "throughout his employment" is incorrect. Connell's performance reviews and his contemporaneous memoranda objecting to those reviews were in the Record Appendix ("R.A.") before the Court of Appeals. R.A. 429-75. Twice Connell had received composite reviews marked "unsatisfactory" and threatening termination unless significant improvement occurred. R.A. 436-38, 440-46. Although Connell routinely complained about the negative comments in his reviews, including his Unit Manager's last two reviews of his performance, R.A. 464, 469-70, 475, he did not contend below that the reviews were age-biased. *See* App. A-6 n.4 ("It is not our function, however, to evaluate job appraisals where there is no evidence that they were motivated or slanted by age animus.").

discouraging prospects and that various positions be eliminated, including her own (App. B-2). After reviewing the matter, Ingalls decided to disband the unit (App. B-2). Ten days later, Connell was told that he would be laid off in thirty days (App. A-17). No bank officer was hired to replace Connell (App. 10). Connell's work was split up among the remaining officers, who were re-assigned (App. A-8). One other individual, age 32, also was discharged as part of the reorganization and the unit manager (whose job also was eliminated, and who also was younger than Connell) subsequently left as well (App. A-8).

Connell's job performance was — it is undisputed — weaker than that of the four other municipal account officers retained (App. A-7, A-10, A-23-24, B-2). First, he had the lowest overall performance rating (App. A-7, A-24).[3] Ingalls also knew that the unit manager was not satisfied with Connell's performance (App. A-7, A-24, B-2). A few months earlier, Connell had refused to agree to goals established for him by the unit manager (App. A-7). She told Connell he should agree to the goals or resign, and communicated her displeasure with Connell to Ingalls, stating that "it is very important that you back me up." (App. A-7-8.)

Connell's pension rights were vested and he received eleven months of severance pay based on his length of service (App. B-2). It would have been less costly for the Bank to have terminated any one of the four younger account officers with less service (App. B-2).

Faced with the unchallenged evidence that Connell's termination was the result of a layoff occasioned by a business reorganization and that his job performance was weaker than that of all the retained officers, the United States District Court for the District of Massachusetts allowed the motion for sum-

[3] The only individual who received the equivalent numerical rating had more favorable accompanying comments (App. A-7, A-10).

mary judgment. The District Court credited an affidavit challenging Ingall's assertion that a bank customer had complained to him about Connell, but in view of the remaining undisputed facts, it found that dispute to be immaterial (App. B-7).

The Court of Appeals for the First Circuit affirmed the District Court. There were three opinions. Judge Campbell found that there was no evidence that the Bank's stated reliance on its reorganization and Connell's relatively poor performance as the reason for his dismissal was pretextual (App. A-14). The opinion goes on to hypothesize that "*even if* plaintiff's evidence were sufficient to rebut the bank's stated reason for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus," and he found that plaintiff had not met that burden (App. A-14) (emphasis added). Judge Torres concurred only with the finding that plaintiff had not shown that the employer's articulated reasons were pretextual (App. A-24). His concurring opinion stated his belief that if the evidence had been sufficient to support a finding of pretext, then the plaintiff's *prima facie* case would have been reinstated and would present a "quintessential question of fact that must be decided at trial. . . ." (App. A-23.) In his dissent, Judge Bownes disagreed both with the evidentiary finding that plaintiff had not shown that the Bank's reasons were pretextual and with the legal proposition that a rebuttal of the employer's reasons may in some cases be insufficient to defeat a motion for summary judgment. The only holding of the case, then, is that Connell did not demonstrate that the Bank's reasons for terminating him were a pretext for a discriminatory reason.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. Petitioner Seeks Review Of The Evidentiary Determination That He Failed To Rebut The Business Justification For His Termination.

In order to reverse the judgment entered below, this Court would be called upon to find error with the evidentiary determination made by two lower courts that Connell failed to rebut the business justification proffered by the Bank for his termination. For that reason alone, a writ of *certiorari* should not be granted. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *National Labor Relations Board* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident to grant cross-petition for writ of *certiorari* that presented primarily a question of fact, "which does not merit Court review."); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924) (dismissing *certiorari* on ground that case primarily concerned a question of fact). *See also Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious error.").[4]

Connell does not dispute that the lower courts properly articulated the first three steps of the burden-shifting analysis used in employment discrimination cases. That analysis required Connell first to present a *prima facie* case of age discrimination. *Texas Dep't. of Community Affairs* v. *Burdine*,

[4] See *also Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924).

450 U.S. 248, 252-53 (1981), *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[5]

Once a *prima facie* case was stated, the burden of production shifted to the Bank to articulate a nondiscriminatory justification for its decision. *Burdine*, 450 U.S. at 253. The business justification proffered by the Bank for Connell's termination was that: (1) Connell's unit was abolished and some employees laid off because of its lack of profitability; and (2) Connell's performance was the weakest in his group as evidenced by the fact that: (a) Connell's overall performance rating was the lowest of the five municipal finance officers; (b) Connell's immediate supervisor was dissatisfied with his performance; and (c) the defendant Ingalls believed Connell had mishandled two specific municipal accounts (App. B-2).

Connell does not dispute that the Bank articulated a satisfactory business justification for its conduct. Nor does he dispute that as a consequence it fell to him to "demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a discriminatory decision," *McDonnell Douglas*, 411 U.S. at 805, *i.e.*, "that the proffered reason was not the true reason for the employment decision." *Burdine*, 411 U.S. at 256 (Petition at 6).

What Connell does dispute, however, is the evidentiary determination made by both lower courts that he failed to raise a material issue of fact concerning the genuineness of the business justification proffered by the Bank. That inherently factual — and dispositive — determination was made in the first instance by the District Court on the basis of the affidavits, exhibits and deposition testimony submitted by the Bank, the paucity of competent evidence offered by Connell, and the

[5] As discussed *infra*, the lower courts would have been warranted in finding that Connell had failed to present a *prima facie* case in this, a reduction in workforce situation, thus providing an independent ground for the denial of his petition.

Court's application of the Massachusetts District Court's Local Rule governing summary judgment presentations. As the District Court explained:

> Local Rule 18 states:
>
> Material facts set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties.
>
> Rather than challenge all or even some of the 41 numbered paragraphs comprising the defendants' statement of undisputed facts, the plaintiff took a different tack, namely, the failure of the Bank to mention the role that early retirement programs played in its decision. He filed a 32 paragraph statement of disputed facts, many of which are not facts at all. Some statements merely dispute the Bank's stated reasons without providing any opposing facts and other statements do no more than point out what the Bank neglected to state. Some statements which might conceivably make a case for discriminatory treatment are based on the plaintiff's subjective views of certain events in the relevant years or ascribes a fact to "common knowledge," or "it appeared" to be a fact. I am left with a defendants' statement of undisputed facts which remain largely intact.

(App. B-5.)

In particular, Connell's opposition to summary judgment failed to offer any competent evidence disputing the genuineness

of the Bank's asserted justification for its conduct — that Connell was the weakest performer of the five account officers in an unprofitable unit being abolished for economic reasons. At bottom, his petition seeks review not of any legal ruling but of that well-documented evidentiary conclusion and therefore should be denied.

The evidentiary straw man set up by Connell relies upon the affidavit of the defendant Ingalls which stated that in addition to Connell's poor performance ratings relative to his peers and the criticism of him by his immediate supervisor, Ingalls also was unhappy with the way in which Connell handled two specific municipal accounts. With respect to one of those accounts, the City of Lynn, Ingalls stated that the City treasurer told him that "if Connell was returned to the City's account, the City would no longer use the Bank as its financial advisor." (App. A-8.) In response, Connell submitted an affidavit of the City treasurer denying that he had told Ingalls that he "would move the account to another bank" if Connell were assigned to the account. The Ingalls affidavit, however, had said nothing about the City threatening to terminate its entire deposit relationship with the Bank but spoke only of a concern that the Bank's services as a financial advisor would be terminated if Connell was returned to the Lynn account. *Compare* App. at B-2 ("It was the function of a municipal finance officer to promote financial advisory services to cities and towns *and* promote a deposit relationship." (emphasis added)). Thus, the Lynn treasurer's affidavit did not in fact rebut Ingalls' statement.

The second affidavit cited by Connell in his petition is that of the treasurer of Northbridge, the other town about which Ingalls was concerned. The Northbridge affidavit is even more deficient, however, in that it failed even to suggest that Ingalls did not genuinely believe that Connell had mishandled that account. As an evidentiary matter, therefore, Connell failed to

offer competent evidence rebutting any of the Bank's asserted business reasons for his layoff.[6]

Although the Court of Appeals acknowledged that the two treasurers' affidavits may have countered one subsidiary element of Ingalls' justification for Connell's termination, it correctly concluded that Connell still had failed to offer any competent evidence tending to prove that the corporate reorganization was not bona fide or that his poor performance relative to his peers was not the reason for his layoff. In that circumstance, entry of summary judgment is correct, because it only is when "*all* legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions [that] it is more likely than not the employer [discriminated]." *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis added). *See also Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) ("Elimination of these *reasons* for the refusal to hire is sufficient, *absent other explanation*, to create an inference that the decision was a discriminatory one.") (emphasis added).[7]

In sum, the lower courts correctly concluded that Connell failed to offer competent evidence to rebut the business reason advanced by the Bank for his termination. Connell's desire to rehash the sufficiency of his evidence before a third court should not be made fodder for a writ of *certiorari*.

[6] The Northbridge affidavit acknowledges Ingalls' basic concern that the town's bond issue had been delayed beyond the effective date of the Tax Reform Act, but holds Connell blameless for the delay. It simply does not contradict Ingall's statement that he believed Connell accountable for that delay (App. A-10).

[7] Connell does not contend that merely rebutting one of several reasons serves to establish pretext, or that there is a split among the circuits on that question. *See, e.g., Sims* v. *Cleland*, 813 F.2d 790 (6th Cir. 1987) (falsity of one alternative and independent non-discriminatory reason does not warrant a finding of pretext as to all articulated reasons); *Logue* v. *International Rehabilitation Associates*, 837 F.2d 150 (3d Cir. 1988) (refusing to infer that falsity of one reason necessarily justified finding remaining reasons pretextual). Nor do any of the Circuit Court of Appeals cases cited by Connell stand for the proposition that evidence which tends to rebut just one subsidiary component of an employer's justification but which leaves intact the justification as a whole precludes the entry of summary judgment.

II. The Petition Seeks A Writ Of Certiorari To Review A Question Not Raised By The Holding Of The Court Of Appeals, Nor Even Raised By The Dicta To Which Petitioner Objects.

Both Circuit Judge Campbell in his opinion for the Court of Appeals and Judge Torres in his concurrence expressly found that Connell failed to offer competent evidence that the Bank's justification for terminating Connell was pretextual (App. A-14 and A-23). Judge Torres wrote separately to stress that while he concurred with that conclusion, he did not subscribe to Judge Campbell's description of the task before the trial court *if* a showing of pretext is made (App. A-24). The limited holding of the case, therefore, is simply that on the facts presented Connell failed to offer competent evidence of pretext.

Connell's petition nevertheless seeks review of an entirely different and unnecessary question — nowhere presented even in dicta in Judge Campbell's or Judge Torres' opinions — namely, whether an employee "must 'rebut an employer's articulated reasons and also directly prove age discrimination. . . .'" (Petition at i, quoting from Judge Bowne's dissent at App. 25.) The petition thus first erroneously assumes that Connell indeed had presented an issue of fact as to pretext, and then goes on to ascribe falsely to the Court of Appeals a holding that notwithstanding proof of pretext, a plaintiff must also "directly prove age discrimination." *Id.*

That contention is untenable given Judge Campbell's admonition that:

> We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer's evidence. Rather, the evidence as a whole, *whether direct or indirect*, must

> be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus.

(App..A-4 n.3) (emphasis added). Viewed fairly, the principle advanced by Judge Campbell is that once an employee presents a genuine issue of material fact as to pretext, the court must look to the facts which gave rise to the original *prima facie* case, the plaintiff's evidence of pretext, and any additional evidence in order to determine whether there is sufficient evidence for a reasonable trier of fact to render a finding for the plaintiff (App. A-16). In Judge Campbell's words:

> Proof along these lines need not be of the "smoking gun" variety and, in some factual settings, the mere showing of the falsity of the employer's stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination. But this is not a matter that can be addressed by formula. For a plaintiff to prevail on his ultimate burden, the totality of the circumstances must in each case create a reasonable reference that the employer's reasons were *a pretext for unlawful* [*age*] *discrimination*. *Burdine*, 450 U.S. at 256.

(App. A-11) (emphasis in original). Thus, the petition's contention that Judge Campbell would require a plaintiff to "directly prove age discrimination" is flatly wrong.

Further, the language in Judge Campbell's opinion which apparently gives rise to Petitioner's concern is, in any event, not part of the holding of the Court of Appeals (App. A-23). The question on which Judge Campbell and Judge Torres appear to differ, fairly posed, is whether the plaintiff's tender

of evidence that the employer's proffered justification for its actions is pretextual serves automatically to resurrect the *mandatory* inference of discrimination that adhered to the original *prima facie* case and thus to require a trial in all cases — as Judge Torres believes[8] — or whether the trial court, even in that circumstance, should look to the totality of the evidence, including whatever inherent probative value the *prima facie* case retains, to determine if an inference of discrimination exists which warrants a trial — as Judge Campbell believes.[9]

That hypothetical question may be of interest, but it is not one presented by the holding in the case below. Thus, even were Connell to have described fairly Judge Campbell's opinion, he would be seeking *certiorari* review of pure *dicta*. In fact, Connell's petition actually seeks review of a proposition of law that was expressly rejected by all three judges below, none of whom would require a plaintiff to "directly prove age discrimination" in any circumstances.

III. The *Dicta* Challenged By Petitioner Is A Correct Statement Of Law And Is In Harmony With The Law In Other Circuits.

When stripped of the hyperbole attached to it by Connell, Judge Campbell's *dicta* emphasizing that "the evidence must

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[8] "[T]he additional question as to whether the inference of discrimination arising from the reinstated *prima facie* case outweighs whatever contrary evidence exists is a quintessential question of fact that must be decided at trial. . . ." (App. A-23.)

[9] "Besides rebutting an employer's proffered reasons for firing a plaintiff, the evidence must ultimately be sufficient to permit the factfinder reasonably to infer that plaintiff was fired because of his age. . . . [E]ven if plaintiff's evidence were sufficient to rebut the Bank's stated reasons for his dismissal, the evidence overall has to be sufficient for a factfinder reasonably to infer that the Bank's actions were motivated by age animus." (App. A-10-11, 14.)

ultimately be sufficient to permit the factfinder reasonably to infer that the plaintiff was fired because of his age" is nothing more than a distillation of Supreme Court precedent governing the burden of proof in employment discrimination cases. Judge Campbell's view that after considering the preliminary finding of a *prima facie* case, the employer's articulation of its non-discriminatory reasons for its action, and the plaintiff's attempt to demonstrate pretext, a court should examine all of the evidence in the case in order to determine whether a jury reasonably could find for the plaintiff is entirely consistent with the opinions of this Court.

The notion that a court should ignore the realities and vagaries of the record before it in favor of the false security provided by strict burden shifting formulas and rising and falling *prima facie* cases was rejected by *Burdine*:

> In saying that the presumption [arising from the *prima facie* case] drops from the case [upon assertion of a business justification], we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a *prima facie* case. A satisfactory explanation by the defendant destroys the legally mandated inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10. (emphasis added).

Similarly, in *United States Postal Services Board of Governors* v. *Aikens*, 460 U.S. 711, 714-15 (1983), the Court stated that once the employer articulates its reason for its actions,

> the *McDonnell-Burdine* presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.
>
> * * *
>
> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine*, *supra*, at 253.

See also Furnco, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic.").

The need to assess all of the evidence, direct and indirect, to determine whether a factfinder might reasonably conclude that the employer intended to discriminate is especially important in reduction in workforce cases, such as here, where the ultimate question is not whether the plaintiff was doing satisfactory work but whether his performance was equal or superior to those of his fellow employees who were retained (App. A-24). Indeed, several courts have held that for a plaintiff in a reduction in workforce case to establish a *prima facie* case he must, among other things, produce circumstantial or direct evidence sufficient to enable a factfinder to reasonably conclude that the employer intended to discriminate, *Matthews* v. *Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985); *Williams* v.. *General Motors Corp.*, 656 F.2d 120, 128-29 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), *e.g.*, by proving

that the employer retained less qualified junior employees. *Samarzia* v. *Clark County*, 859 F.2d 88, 91 (9th Cir. 1988); *Dorsch* v. *L.B. Foster Co.*, 782 F.2d 1421, 1424 (7th Cir. 1986). Connell's utter failure to adduce such evidence thus also would have warranted dismissal of his claims for failure to establish a *prima facie* case, an independent ground for denying his petition for a writ of *certiorari*.

A considered review of those cases from other circuits cited by Petitioner as in conflict with Judge Campbell's views reveals that those courts either expressly or implicitly also decide employment discrimination cases based upon the inferences which properly may be drawn from the totality of evidence before them, and not through an unthinking deference to the plaintiff's original *prima facie* case.[10] There is, therefore, no

[10] *See, e.g.*, *Krodel* v. *Young*, 748 F.2d 701, 706 (D.C. Cir, 1984) ("The district court, by contrast, concluded that [plaintiff] could prevail by demonstrating that the [defendant's] explanation was a sham and by offering additional evidence of age discrimination [by the defendant]. We conclude that the district court's approach is entirely correct.") (emphasis added); *Samarzia* v. *Clark County*, 859 F.2d 88, 91 (9th Cir. 1988) ("The *other evidence* of intentional discrimination includes [plaintiff's] supervisor's (and coworkers') references to him as the 'senile' intake officer and his supervisor's expressed expectation that [plaintiff] would retire soon.") (emphasis added); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) (evidence included sexual harassment by supervisor); *MacDissi* v. *Valmont Industries, Inc.*, 856 F.2d 1054, 1959 (8th Cir. 1988) (a discredited explanation "*may* persuade the finder of fact that such unlawful discrimination actually occurred.") (emphasis added); *Carden* v. *Westinghouse Elec. Corp.*, 850 F.2d 996, 1004 (3d Cir. 1988) (although evidence that supervisor told plaintiff the company wanted someone younger was held inadmissible, evidence which rebutted employer's sole business justifications for termination was held sufficient to require a trial); *Ramseur* v. *Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989) ("the plaintiff is not required to prove that the employer's proffered reasons are false but only that they were not the only reasons *and* that age made a difference") (emphasis added); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371, 376 (7th Cir. 1988) ("The plaintiff presented substantial evidence from which the jury could have found that the plaintiff's age was a determinative factor in the defendant's decision to terminate the plaintiff."); *Fite* v. *First Tennessee Production Credit Ass'n.*, 861 F.2d 884, 890 (6th Cir. 1988) ("The ultimate issue in this age discrimination suit is whether age was a determining

conflict among the circuits concerning the rejection of the type of mechanical, formalistic approach to a plaintiff's *prima facie* case advanced by Connell. Nor is there any basis whatsoever for Connell's suggestion that the First Circuit requires the plaintiff to offer "direct proof" of discrimination, or a "smoking gun," or to meet any other evidentiary threshold above what is required generally for a plaintiff to survive a summary judgment challenge.[11]

Accordingly, Judge Campbell's opinion is entirely consistent with this Court's holding that the standard for summary judgment is simply "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). *See generally Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984), ("Discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion."). Although the decision on a Rule 56 motion in a discrimination case may be aided by reference to the shifting production of evidence rules of *McDonnell Douglas* and *Burdine*, in the end the district court must determine not whether the dance steps have been followed, but rather whether there is evidence from whatever source adequate to enable a trier to find for the plaintiff. *Cf. Aikens*, 460 U.S. at 716 ("[N]one of this means that trial courts or reviewing

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factor in the employer's decision to fire appellee."); *Mitroff* v. *Xomox Corporation*, 797 F.2d 271, 278 (6th Cir. 1986) (affirming use of jury instruction which twice stated burden was on plaintiff to establish discrimination by a preponderance of the evidence); *Thornbrough* v. *Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) (employee's evidence which disputed that he was not an effective performer, that he was unqualified for remaining jobs, and that his position was part-time precluded the entry of summary judgment for employer).

[11] *See e.g., Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1114-15 (1st Cir. 1989) (reversing grant of summary judgment in age case based on circumstantial evidence of discrimination), cited with approval at App. A-3.

courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the 'basic allocation of burden and order of presentation of proof,' *Burdine*, 450 U.S. at 252, in deciding this ultimate question [of discrimination *vel non*]."). Judge Campbell's opinion said no more than that.

IV. Connell's Construction Of The ADEA Would Frustrate Its Congressional Purpose.

In arguing that district courts should ignore the specific facts of cases before them and seek refuge in talsmanic, burden-shifting formulas, Connell ignores the most fundamental Congressional purpose of the Age Discrimination in Employment Act. The ADEA's *raison d'etre* is to sanction discrimination based upon age. *See generally Aikens*, 460 U.S. at 715 ("The 'factual inquiry' in a Title VII case is [whether] the defendant intentionally discriminated against the plaintiff."); *McDonnell Douglas*, 411 U.S. at 805 (plaintiff must show that reasons proffered by employer "were in fact a cover-up for a racially discriminatory decision"); *Burdine*, 450 U.S. at 256 (plaintiff has "ultimate burden of proving intentional discrimination"); *Furnco*, 438 U.S. at 578 ("plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination").

A formalistic approach to summary judgment dispositions only can frustrate the purpose of the ADEA, especially where a plaintiff's *prima facie* case is based, as it was here, on a showing of minimal competence and not on a showing that the employee performed as well or better than his retained peers. For example, as Judge Torres noted, if the rules were as

woodenly applied as Connell would have them be, an employer who terminated a 41 year old employee to make room for the employer's nephew would be forced to trial to defend a charge of age discrimination if it had originally offered an additional explanation for its conduct other than its nepotism, which reason then was rebutted by the employee. Although the employer's nepotism and subsequent attempted cover-up would be offensive, it would not and should not constitute age discrimination. Unless trial courts retain their discretion to evaluate the *prima facie* case and all of the other evidence before them in order to determine whether age discrimination in fact has occurred and not simply whether judicially-created burdens and inferences have been shifted or destroyed, the enforcement of the ADEA will have little to do with the eradication of age discrimination.

CONCLUSION

For each of the foregoing reasons, Respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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